In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 396

CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED, A CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1–26) is reported at 375 F. 2d 43. The Commission's report and order is reported at 29 Fed. Reg. 11099; its memorandum opinion and order denying reconsideration (Pet. App. B, 27–60) is reported at 30 Fed. Reg. 2706.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, 61) was entered on March 7, 1967, and a petition for

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rehearing was denied on April 21, 1967 (Pet. App. C, 62). The petition for a writ of certiorari was filed on July 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a rule-making proceeding in which the Commission adopted new rules imposing restrictions on the use of frequencies assigned to the Citizens Band Service conformed to the procedural requirements of the applicable statutes.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*) are printed in the petition (Pet. 10–11). Section 553 of Title 5 of the United States Code, 80 Stat. 383, and the relevant portions of the Commission's Rules and Regulations are printed in the Appendix, *infra*, pp. 11–13.

STATEMENT

The Citizens Radio Service—designed for private, short-range radio communication with minimal licensing requirements[1]—originated in 1945 when the Federal Communications Commission, after extensive

[1] This service is to be distinguished from the Amateur Radio Service, which fulfills an entirely different purpose. Amateur licenses are granted for hobby-type activities and only after the applicant has demonstrated some technical proficiency. See part 97 of the Commission's rules, 47 C.F.R. 97.1 *et seq.* A hobby-type communication has been defined as "operating the radio station as an activity in and of itself," 47 C.F.R. 95.83(a)(1), rather than for the purpose of conveying specific messages.

inquiries and hearing, allocated a portion of the radio spectrum for a new service, intended for essential local communications such as those entailed in the operation of department stores, farms, and construction projects. Originally, limitations on usage were kept at a minimum in order to foster development of the service (Pet. App. A, 2). However, in 1949 the Commission codified the rules governing the new service and announced certain prohibitions on the types of communications allowed. 14 Fed. Reg. 1596.

In 1958, the Commission revised the rules and established a new class of station (Class D), authorized to operate on certain frequencies in the 27-megacycle band.[2] The new class was created to fulfill the increasing need for short-distance voice communication by radio for personal or business use. 23 Fed. Reg. 6128. Eligibility requirements were minimal, and the number of Citizens Band licensees began to expand rapidly.

It soon became apparent that a substantial number of Class D licensees—contrary to the original purpose of the Citizens Radio Service—were engaging in hobby-type activities, lengthy transmissions of idle chatter, and long-distance contacts commonly called "skips". Such communications were inimical to the public interest because they resulted in interference with those licensees who had a definite and legitimate need for short distance radio communication and

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[2] The rules provide for three other classes of Citizens Band licensees. See 47 C.F.R. 95.3(b). For purposes of this case, however, only Class D stations, representing more than 90 percent of the total number at present, need be considered (Pet. App. A, 3, n. 2).

who restricted their use of the allocated frequencies to purposes permitted by the rules. They also violated the basic nature of the service—communication between units of the same station rather than between different stations. 29 Fed. Reg. 11101. Increasing misuse of the service prompted the Commission in 1960 to amend its rules in order to make more explicit the restrictions on the kinds of communications permitted in the service. 25 Fed. Reg. 1408. The Commission again emphasized that the service was intended not for hobby-type activities, but for useful substantive messages relating to the business or personal activities of the individuals concerned. 25 Fed. Reg. 1411.

By November 1962, there were 350,000 Class D licensees, and abuse of operating privileges had become so widespread as to threaten the utility of the service (Pet. App. A, 5). The Commission, therefore, issued a Notice of Proposed Rule Making in which it proposed further amendment of the rules in order to enunciate even more clearly the prohibited and permissible uses of the service in accordance with its original purposes. More than 2,500 comments, representing many divergent views, were received and analyzed. In its Report and Order of 1964 adopting the new amendments, 29 Fed. Reg. 11099, the Commission added a new section to the rules, elaborating on the more important restrictions. See 47 C.F.R. 95.83(a) (1)–(16).

Since the majority of the abuses had occurred during communications between stations of different licensees, inter-station communication was restricted to seven specific frequencies out of the 23 available. All

licensees communicating with units of their own station (*i.e.* intra-station) remained free to use any of the 23 frequencies reserved for Class D usage. 29 Fed. Reg. 11101, 47 C.F.R. 95.41. The new rules, while retaining the existing limitation on the duration of inter-station communications, lengthened the silent period between such messages from two to five minutes. 47 C.F.R. 95.91(b).

Petitioner, among others, sought reconsideration; it was denied. 30 Fed. Reg. 2706. Petitioner then filed a petition for review in the court of appeals. On March 7, 1967, the court affirmed the orders of the Commission (Pet. App. A, 1–26). After a detailed analysis of the contentions of the petitioner, and a thorough consideration of statutory and judicial authorities, the court concluded that the Commission's actions were reasonable and that no basis had been shown for disturbing them (Pet. App. A, 24–26). It further held that the Commission had not committed error in promulgating the rule amendments without public evidentiary hearings (Pet. App. A, 21).

ARGUMENT

1. There is no merit to petitioner's argument (Pet. 10–17) that the rule changes lengthening the required silent period between inter-station transmissions and reducing the number of available channels for inter-station use from 23 to 7 constituted license modifications that required a trial-type hearing. To be sure, 47 U.S.C. 303(f) provides that no changes in the frequencies or times of operation of any station may be made without the consent of the licensee, unless after

a public hearing the Commission determines such changes to be in the public interest. But, as the Commission held, this provision applies only to those cases where the Commission changes the basic license right—*e.g.*, the times of day during which a licensee may operate his facility—and not to the kind of change effected here (Pet. App. B, 52). The Class D licensee may continue to operate his facility on a 24-hour basis. The only change made by the rules in this respect is that the required silent period between inter-station transmissions is lengthened from two to five minutes. And there is no change in the rules governing intra-station communications.

Unlike the broadcast services, the Citizens Radio Service is characterized by shared use of the assigned frequencies, and it has long been necessary for the licensees to restrict their use of the airwaves to essential and brief communications in order to permit widespread use of the channels. Thus, as the court of appeals observed (Pet. App. A, 20):

> The rule change in question * * * constitutes a relatively minor adjustment. In so concluding, we take note that the primary purpose of a * * * Class D license is for intra-station communication. Minor changes in carrying on inter-station communications could not, therefore, be considered of sufficient consequence to entitle a Class D licensee to a public hearing under section 303(f).

The Commission and the court reached the same result, and rightly so, with respect to the restriction of inter-station transmissions to seven of the 23 assigned

channels (Pet. App. B, 50–51; Pet. App. A, 21, n. 14). In the Citizens Band Service, specific frequencies among the 23 available are not assigned to licensees. The prior rules permitted use of any of the 23 channels, primarily for intra-station uses, and secondarily for communications with other Class D stations. Under the amended rules, the same 23 frequencies remain available to all Class D stations but only seven of them may be employed for inter-station use. As the Commission said: "Since all 23 frequencies continue to be available for the primary purpose of this service, viz., communications between units of the same station, this change in usage does not constitute 'changes in the frequencies' available to any Class D stations within the meaning of Section 303(f)." (Pet. App. B, 51.)[3]

Petitioner's reliance upon 47 U.S.C. 316—which provides that a license modification may be effected only after a public hearing unless the licensee acquiesces in the modification—is similarly misplaced. Here, the Commission did not modify an individual license. It promulgated rules for the future of general applicability to an entire class. Accordingly, it properly followed the procedures for general rule-making as set forth in 5 U.S.C. 553. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33; *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624

[3] The rules specifically provide for emergency operation, 47 C.F.R. 95.85, and waivers may be had upon a sufficient showing. 47 C.F.R. 1.3.

(C.A.D.C.), certiorari denied, 385 U.S. 843. The rules in question affect 840,000 licensees; the policy questions explored and determined in the rule-making inquiry were national in scope and equally applicable to the entire class. No facts bearing upon the particular situation of any of petitioner's members, or any other individual licensee, were considered by the Commission. Relying on the cases cited above (and others) the court of appeals held (Pet. App. A, 17–18) that, in these circumstances, no hearing was required:

> [I]t is apparent from a reading of the statute that its primary function is to protect the individual licensee from a modification order of the Commission and is concerned with the conduct and other facts peculiar to an individual licensee. We therefore hold that the general rule making procedure followed by the Commission was not violative of section 316(a) of the Act.

2. There is no merit in the points raised by petitioner concerning evidentiary matters (Pet. 18–20). Since this rule-making proceeding was not required to be conducted on the basis of a record, 5 U.S.C. 553—

> it was not necessary for the Commission to receive any evidence, as such, in this rule making proceeding. It was necessary only for the Commission to provide opportunity for, and consider, "written data, views, or arguments with or without opportunity for oral presentation," and this it did. * * * It follows that section 706 (2)(E) [of 5 U.S.C.] does not entitle petitioner to request this court to review the substantiality of the evidence. [Pet. App. A, 22.]

The Commission was not limited to consideration of evidence presented in a formal manner. It was free to act upon the basis of information available in its files and its general knowledge and experience. *Pacific Coast European Conference* v. *United States,* 350 F. 2d 197, 205 (C.A. 9). See, also, *American Airlines, Inc.* v. *Civil Aeronautics Board, supra,* at 629.[4]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The cases relied upon by petitioner are inapposite. In each, the proceeding was adjudicatory or quasi-judicial in nature, and the agency was therefore required to act on the basis of the evidentiary record.